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ABSTRACT

This document brings together news media and constitutional law specialists with past and present government officials to define the areas of conflict and the operative constitutional rules and to devise ways to maximize the flow of information to the public without destructive confrontations between the media and government. Contents include: "The News Media and the Government: Clash of Concentrated Power," which lists guides for the news media and the government to resolve differences; "The Pentagon Papers/Times Adversaries Agree," which suggests that the Supreme Court was called upon because the press and government had not exercised the necessary restraint or responsibility; "The Human Factor," Which argues that the apparatus of public information cannot overwhelm the skilled performance of a responsible press; "Institutional Revolt," which cites surveys indicating public mistrust of complex and distant institutions of power both in government and the news media; and "Press and Government: Aspects of the Constitutional Position," which argues that power in the press and government is too concentrated. (RB)

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# The News Media and the Government:

# Clash of Concentrated Power

CS 201 063

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# A Freedom House consultation

For longer than six years Freedom House has been troubled by the changing perception of the news media in American society. A major evaluation of press performance has been under way at Freedom House for several years. There has recently been particular concern over the deteriorating relationship between the media and government at all levels.

Freedom House consequently convened a News Media/Government Consultation at the University of Maryland, College Park, June 26-27. Leading newsmen and present and past government officials took part.

The call to the consultation posed the question whether "the press" and/or "the government" has each in its own way hardened its adversarial position; whether there is now a closing of ranks on both sides, producing a *de facto* war of the worlds (press vs. government).

The meeting was asked to define the real areas of press/government conflict, setting forth the operative Constitutional rules, and recommending specific common sense procedures by which to maximize the flow of information to the public without destructive confrontations.

Participants included newspaper publishers, editors, reporters, and a columnist; radio and television management and editorial personnel; the deputy assistant secretary of defense for public affairs; the chief counsel of the Senate subcommittee on constitutional rights; and the former adversaries in the *Pentagon Papers-New York Times* case, former U.S. Attorney Whitney North Seymour, Jr. and Prof. Alexander M. Bickel of Yale Law School.



The two days of discussion and preparation of papers resulted in the subsequent drafting of a single statement and guidelines entitled "The News Media and the Government: the Clash of Concentrated Power." We publish here the full text and list of participants.

Canham, van Slyck, Gideonse, Backer

**Participants**

William Attwood, president and publisher, *Newsday*

George Backer, author, former publisher, New York *Post*

Lawrence M. Baskir, chief counsel and staff director, Subcommittee on Constitutional Rights, United States Senate

William Beecher, Deputy Assistant Secretary of Defense

Alexander M. Bickel, professor, Yale Law School

Erwin D. Canham, editor-in-chief, *Christian Science Monitor*

Leo Cherne, executive director, Research Institute of America

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Allan Jackson, CBS Radio News

John Lynch, Washington bureau chief, ABC-TV News

Thomas B. Ross, Washington bureau chief, Chicago *Sun-Times*

Whitney North Seymour, Jr., former Federal attorney, Southern District of New York

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Consultation photos by David Sussman

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## The News Media and the Government: Clash of Concentrated Power

Relations between the news media and the executive branch of the federal government are deplorable,[1] though in many instances able officials and conscientious journalists still fulfill their respective responsibilities admirably. Yet the general situation is harmful to the public interest and should be rectified.

The danger is that there is too much power in government, and too much in the institutionalized press, too much power insufficiently diffused, indeed all too concentrated, both in government and in too few national press institutions, print and electronic. The accommodation works well only when there is forbearance and continence on both sides.

But these qualities have not prevailed. Instead, both government and news media have exacerbated their normal adversarial relationship so that each has suffered losses of credibility in the estimate of the public. Still graver breakdowns may ensue, if popular trust and confidence in both institutions continue to erode.

How did we get into this plight? Over recent decades government has grown immensely, the bureaucracy has become unwieldy, the structures of information offices and of news reporting have mushroomed; electronic news has made instant impact, vividly and emotionally conveyed; the atmosphere of wars, hot and cold, has intensified the classification and withholding and even manipulation of information on grounds of national security; particularly traumatic have been the controversies over the American involvement in Indo-China, the tragedies and abuses of Watergate, the growing bitterness and misunderstanding in the Presidential relationship with the press in the past decade, the immense buildup of power and isolation in the White House offices, the dreadful pyramiding of costs for running for office and some of the lamentable techniques now used to gain votes, the growth of mistrust toward most institutions. All these and many other factors have contributed to the corrosive conflict between government and press.

What can be done about it? Let us note that while relations between the news media and the executive branch of government have become increasingly strained, little such stress exists between the press and the legislative branch. Does this not suggest that a genuine diffusion of power through the executive branch and the cabinet offices, with attendant decentralization of news sources, might lead to a better, freer, more open relationship?

We urge that both government and media reexamine their responsibilities to the citizen public. The executive branch should greatly diminish the classification of information and cease efforts to manage the news, should cooperate in greater access of news people to those in government who are substantively informed about the significant news of the day.

The media need always act with integrity and a sense of responsibility toward the national welfare, which transcends the interest of a particular office-holder, or of a particular news enterprise, or a particular section of the country.

The long-standing adversary relationship between press and government has often been very healthy. It can be again, just as soon as an attitude of mutual respect is deserved and restored.

## A General Guide for Government Officials

We believe government should forthrightly provide information about its activities, except in the narrow area of legitimate national security.[2] National security is hard to define. It means different things to different people. We believe this phrase has been overused, frequently misused, and therefore must be used with care. We recognize that genuine national security must include certain information relating to this country's military strength and diplomatic processes. For instance, we believe that national security requires protection of information dealing with such things as the precise details of certain current military deployments, cryptographic material, and the technology of advanced weaponry.

As to the diplomatic process, we recognize there may be instances in which the details of negotiating positions should for a time remain confidential, if the parties to the negotiations so insist and if the United States government is convinced that such confidentiality is essential to success.

Because of the vagueness of the phrase "national security" and its susceptibility to abuse, we believe that the government has the obligation to define through public debate what specifically must be kept secret, under what circumstances and conditions.

We recognize also that as a part of the system of checks and balances, a diligent and skeptical Congress and press must do everything possible to make the

1 See Notes at the conclusion of the statement

ernment fulfill this obligation.

Beyond the area of national security, we believe that federal government, as well as state and local ernments, are obligated to provide the freest flow of rmation. This flow must be consistent with the protec- of the privacy of private citizens; of individual rights such things as due process in criminal investigations, tters relating to personal taxes or family welfare and such fields as Securities and Exchange Commission trictions c eated to protect the public in the market- ce. We believe the proper guideline is demonstrable of that the information at issue would interfere with rights of the individual or hamper the administration justice or breach the privacy of certain nonsecurity in- mation, such as advance crop data which in the ional interest should be withheld until released in ap- priately fair fashion.

Government also has the obligation to protect the vacy of its own negotiating and decision-making cess. Just as the judicial conferences of the Supreme urt are held in privacy—and not only to protect in- iduals appearing before the Court—so decision- kers in the executive branch are entitled to privacy in king advice of staff and weighing alternative policies. e limits of protection may be difficult to set. Often it is matter of timing—protecting privacy until decisions are de or negotiations completed. While the executive of- r's privacy should be of limited duration, the staff is itled to more than temporary protection.

## General Guide for e News Media

The effective performance of journalism sometimes quires it to be an adversary to other centers of power. It ital, however, that the adversary relationship not be agonistic. It is equally important that government un- stand that the adversary function of journalism is in long-term best interests of effective government. In t spirit responsible journalists should undertake more tical and investigative reporting.

The journalist has the right and obligation to netrate the decision-making process but not to publish ormation which would clearly endanger national urity or public safety. Civil disorders which have aracterized the recently turbulent period call for self- traint by the news media and, only in grave emergen- s, the restriction of the press by government (as with ech and assemblage).

The press properly asserts but does not necessarily fulfill the public's right to know. The public therefore has the right to know how the press operates, its limitations and weaknesses. The daily press report, at best, is a rough first draft of history. Because it is sometimes misled, because it is sometimes obtuse or careless, the information it provides may in the long run prove to be incomplete or erroneous. When in error, it should apply correctives as rapidly as possible. But press and public alike should recognize and accommodate to the fallibility inherent in a medium called upon to report increasingly complex and widespread issues and events under stringent deadlines.

The Constitutional freedom of the press includes the right of all news media to inform, but they must not resist legitimate inquiries by the public into their performance.

We urge that the press be sensitive to the complaint of any segment of the community which feels it has insufficient access to the media.

Responsible journalism provides a balance so that adequate play is given to all sides of controversial news.

Opinion and advocacy journalism should be clearly, visibly identified as such.

All journalism schools would do well to include a basic course in law, particularly as it pertains to the rights of the individual. There should also be an obligation assumed by public legal agencies—from criminal prosecutors to regulatory authorities at state and federal levels—to make their facilities available to brief journalists and journalism students on government processes. In the Southern District of New York, the U.S. Attorney's office invited journalists to observe the complete judicial process, restricting only the reporting of particular cases. This experiment may well serve as a model.

## A General Guide for Government and the News Media in Directing Their Relationship in Judicial and Other Processes

1. The successful free press/fair trial guidelines and conferences which have been adopted in several states should be extended throughout the nation, with the fullest possible participation by representatives of news media, bench and bar. Constructive dialogues on other subjects of mutual concern and interest should be encouraged and facilitated among the participants.

2. a. The news media should continue to be free at their own discretion—and risk—to publish any information which comes into their possession concerning judicial proceedings, including grand jury testimony.

It should be understood that in the grand jury system in many jurisdictions, including the federal, the witness is free to reveal what happens in a grand jury room; sessions are held in secret primarily to protect the witness. Publishing information concerning grand jury proceedings should be carefully weighed against the possibility that publication may place the witness in jeopardy, may impede the administration of justice, and may unfairly injure third persons.

In this or other matters, journalists are not free to engage in criminal conduct, or to aid or abet others in criminal conduct, in order to obtain such information, and are fully answerable for any such violation of law on their part.

b. Confidential news sources should be protected. Investigative reporting is today seriously endangered. We support implementation of standards to be followed by courts in passing on motions to quash subpoenas generally in keeping with the principles referred to in the opinions of Justices Powell and Stewart concurring and dissenting in the *Caldwell* case.[4] We recognize there has been a breakdown, at times, in the tacit relationship between press and prosecutors which had existed, without statutes, at the federal and most state levels.

The mutual respect of the press and prosecutors ought to be reestablished so that reporters may fulfill their legal, moral and public obligation to confide in prosecutors when necessary in the public interest, and prosecutors may inquire into press sources when they feel it is absolutely essential. This relationship cannot be restored by legislation, but only by mutual trust.

3. No "Official Secrets Act" should be adopted which would permit government officials to control press publication of documents through a document classification procedure. A sensible revision of the Espionage Act to clarify its scope and applicability is long overdue.

4. The government should not force news media to rely on formal litigation under the Freedom of Information Act to obtain access to information in the possession of government agencies.

5. National and local press councils should be carefully observed to discover whether they do indeed help restore and maintain public confidence in the fairness and objectivity of the press. At a time when the press faces a credibility crisis, the councils might enable the public to scrutinize the news media, provide for the airing of legitimate grievances, and open a useful dialogue between the press and the public. But press councils could become counterproductive if they lack the time, knowledge or balance properly to fulfill their self-assigned mission. In taking positions on the "fairness" of press coverage of an issue, any council also risks becoming ensnared in the controversy over the issue itself.

6. In light of the loss of remedy for injured persons resulting from the strict limitation on the right to sue for libel, consideration should be given to creating a new statutory right of redress under which a person who believes he has been aggrieved because of a false news account may demand publication of a retraction, upon a showing of grounds therefor. In the event no retraction is published, he may then recover compensatory damages if he can prove in a court of law that the original news account was false.

7. The American people should have the right to the free flow of news in the broadcast media, unregulated by government. With the increasing diversity of radio stations, television channels, and cable TV technology, the original rationale for governmental regulation is passing. We hope the day will soon arrive when the Fairness Doctrine and other regulatory procedures may be eliminated.

## A. Specific Guidelines for Government Officials.

1. Upon request, a government official should be willing candidly to discuss the substance of information which comes into his possession during the course of his official duties, unless he is convinced that public disclosure will harm the public interest. A government official ought not refuse to make disclosure of information in his possession in order to protect personal or political interests.

2. In the event that a government official believes that disclosure of information will harm the public interest, he should inform any journalist requesting such information of the fact of its existence and the general reasons for his decision not to make disclosure.

3. A government official should not resort to the device of "leaking" information to a journalist or providing the information "off the record" unless there is good and sufficient reason why he cannot openly make disclosure of such information and he advises the journalist of his reason for doing so indirectly.

4. A government official should not release false information or make false representations as to the existence or nonexistence of requested information.

5. A government official should, upon request, provide all responsible journalists equal access to infor-

mation which is to be disclosed.

6. A government official should make himself reasonably available to respond to inquiries from journalists.

7. A government official should continuously bear in mind his obligation to account to the public on the discharge of his office and his responsibilities, and should be willing to make full and accurate information available concerning the same at regular and frequent intervals.

8. No agent of the government should impersonate a reporter.

## B. Specific Guidelines for Journalists.

1. A journalist should report the news impartially and fairly.

2. A journalist should assume full responsibility for the accuracy and truthfulness of any news he reports. He should adequately qualify the reliability of any unidentified news source whenever making public information from such source, to enable the public properly to decide the weight to be given to the information.

3. A journalist should protect the freedom of the press, while giving due consideration to the constitutional rights of others, including the right of persons accused of crime to due process of law.

4. A journalist should avoid activities which might create a conflict of interest, and should promptly disclose to his employer any actual or potential conflict.

5. A journalist should file with his employer regular reports of outside compensation and financial interests.

6. A journalist should refrain from publicly undisclosed extracurricular activities which might raise questions about his professional objectivity.

* * *

The irreducible issue with which we are concerned is the right and need of the citizenry to be fully, accurately and continually informed of the action and policies of its public servants. This requirement, which the First Amendment guarantees, imposes on both government and news media the obligations to repair their badly damaged professional relations, to restore mutual respect and collaboration in the faithful release and reporting of public information, and to subordinate their respective institutional interests to the overriding interests of an enlightened and responsible electorate.

### Notes on the report

1. By Wallace Westfeldt: I think this characterization is much overdrawn. The condition that exists between the press and the government may be uncomfortable at times for those people who inhabit those institutions. But the result of this condition has been more information to the people about how their government operates and certainly this is not deplorable.

2. By Wallace Westfeldt: I have serious reservations about the phrase "national security." I believe "national defense" is a more appropriate one.

3. By Lawrence Baskir, joined by Erwin D. Canham, Thomas B. Ross, and Wallace Westfeldt: I do not believe there properly are any restrictions on the right to publish, even information which clearly endangers public safety. A newsman might be admonished to use discretion in critical cases, but the implication that he has no "right" to publish is one on which I vigorously dissent. Similarly, I disagree that the government's ability to restrict assemblage in emergencies is a measure of its power to restrict the press. Should there be emergencies great enough to raise the question of press control, they are so extreme (and hypothetical) as not to justify even mentioning.

4. Justice Powell declared: "... If the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court in a motion to quash and an appropriate protective order may be entered..." Justice Stewart wrote: "... "When a reporter is asked to appear before a grand jury and reveal confidences, I would hold that the government must (1) show that there is probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights, and (3) demonstrate a compelling and overriding interest in the information."

Westfeldt, Sussman, Attwood

# *Pentagon Papers/Times* adversaries agree

*At the Freedom House consultation, the following colloquy took place between the* Pentagon Papers *adversaries, Whitney North Seymour, Jr., former U.S. Attorney for the Southern District of New York, who prosecuted the* Times, *and Dr. Alexander M. Bickel, the* Times' *attorney and Yale Law School professor.*

PROF. BICKEL: The adversary relationship means that you rely on process, because we don't know answers, just as we rely on process in the criminal process. We could do with criminal procedure as other countries do and put someone in charge, sitting in a quasi-judicial capacity and doing a more rational job, perhaps, than we do by getting in a pit and fighting it out in an adversary way. Angela Davis was asked if she thought the acquittal result in her case was fair. She said no, the only fair result would have been no trial. But that result is achievable only in countries where the innocent are never tried, where only the guilty get tried. Then the results are always "fair." The innocent aren't put to the expense of a trial. But that puts too much responsibility in a single place, and we rely on the adversary process instead.

So we do here, in the press-government area. We don't know how much information the government should withhold properly and how much should be published. We say we put press and government in the bear pit and they fight it out. That won't work any more than it would work in a trial if both sides are under no restraints, no self-imposed restraints, no professional ethics, if there were nothing of the sort that operated on either side.

In the criminal process, all kinds of obligations apply, for example, the prosecutor's obligation to reveal evidence, and so forth.

By the same token, we need self-imposed restraints in this area. That is what we mean by responsibility.

* * *

MR. SEYMOUR: Not having had the advantage of owning the print media and the airwaves at the time of the Pentagon Papers case, I must candidly report that nobody really did understand what the case was about. Everybody thought it had something to do with trying to avoid embarrassment for the Johnson Administration. Professor Bickel and I, who were there in the courtroom, are reasonably familiar with the issues. The principal argument we advanced on behalf of the government was that the reason for bringing the question before the court was that the decisional process had not gone on—the editors of the *Times* had not consulted with those who could tell them whether there were sensitive documents that would injure the public interest, and, therefore, the court was asked to intervene and itself pass on the question. I think that issue is still a valid issue. The Supreme Court still thinks that is a valid issue. There are situations in which such a test will provide a basis for enjoining publication. Yet we should never have to come to the point where the courts must be called on to perform that function.

The point I would like to hammer at is this: if the government can no longer be trusted to give judgments that this is or is not damaging to the national security if you publish it, then somebody has to fill the vacuum, and that somebody is the editor who makes the decision as to whether the story is to go or not. The first line of responsibility is the journalist. I know many of them will say, "I don't see any point to running that story." If, however, a journalist simply takes the view that he has got a scoop and wants to run it, I think an editor must take some kind of responsible position on the story.

There ought to be some kind of articulation somewhere—and I would hope this group might consider it—of the fact that a free press carries with it an obligation that those who control that free press go through a rational process of decision as to whether or not to publish a particular story that may have adverse consequences.

PROF. BICKEL: I would like to second that. I entirely agree. I think the real meaning of the Pentagon Papers case was a breakdown that has been referred to several times around the table—a breakdown in what a decade before, or less, would have been the normal process. It was an attempt to cure the breakdown by bringing the judicial process in. And I think very properly it failed, because that would not have been a proper cure.

Mr. Seymour (l.) and Prof. Bickel at the news media consultation

I tell no tales out of school. One very prominent journalist said when the case broke that this would never have happened ten years before. The story would have been checked out. There would have been a relationship of confidence such that he would have gone to someone, as the *Times* did with the Bay of Pigs story, and said "Look, we have this stuff. What do you think should be done? What parts of it are no good?" The assumption would be that nobody would try to stop him from publishing. The assumption would equally have been that no one was making his decision for him. There would have been an advisory session on the basis of mutual confidence, and the thing would have been straightened out.

That had broken down by the time the Pentagon Papers came. The effort was to put the courts into the breach. That had to fail, and did fail in those circumstances, although there are conditions left where the courts might intervene. And the problem before us really, so far as national security information is concerned—perhaps it is a problem throughout—is how to restore the conditions in which the adversary process worked. It really is very much like some rogue lawyer or prosecutor walking into a trial and disregarding its conventions—the kind of breakdown represented by the Chicago Seven trial, where the whole thing comes apart, where the assumptions of a process on the outcome of which we rely for the definition and vindication of the total interest, where the conditions in which a process like that can work and can give us that final vindication of the national interest break down. When that breaks down, whether it is the judicial process or the government/press relationship, it is shot. The trial of the Chicago Seven was no trial. That wasn't the judicial process operating. By the same token, the Pentagon Papers case was not the process of a free press in its adversary relationship with a government like ours, although I do not suggest that the fault lay with the press.

I think that is an entirely correct diagnosis and puts the finger on the problem.

Roscoe Drummond

Erwin D. Canham

# The Human Factor

Let me begin where I would conclude. I don't think there is anything wrong with the relationship between press and government, and the relationship between the media and the public, which could not be greatly improved by a steady improvement in the quality of the people who are doing the job—more conscientious, more intelligent, more vigorous and perceptive professional performance of the tasks. Increased responsibility of news media will take us a very long way.

* * *

Without diminishing the penetrative vividness of the spoken word and image, if and as we learn to use written language better, if we carefully prune and work hard at writing and use the tool of language the way it ought to be used, taking time enough to chisel and shape words as can be done when a lot of thought is mixed in their use then we have nothing to fear. I think that supports the point I made earlier, namely, that we have our future in our hands, and that written language can be a tool with just as sharp an edge as the spoken language or image.

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**Mr. Canham, editor-in-chief of the *Christian Science Monitor*, served as co-chairman, with Roscoe Drummond, of the Freedom House consultation on news media/government relations.**

# Press and Government

## *Aspects of the Constitutional position*

by Alexander M. Bickel

I address first the relationship of the press to the executive and legislative branches of government, and I lump these two together, because in legal contemplation the position is much the same as to both, although in practice access to the Congress is, of course, quite a different matter from access to the executive. I will at the end say a word about the relationship with the judiciary.

American law, First Amendment and all, accepts the proposition that effective government requires a measure of privacy, and that the function of government at times, therefore, is to suppress information. This means that government has pretty much plenary power to seek what I would call security at the source. It can decide what is to be private and what public, and cause its servants to behave accordingly, both after the fashion of a private enterprise, by using disciplinary power, and in very large measure by use of the criminal sanction against its servants if they disobey its rules. The criminal sanction may be quite widely used against outsiders as well. Laws against theft and against burglary are fully applicable, and there are special laws such as the Espionage Act, and there could be more and tighter ones.

There are things government may not do, generally or to guard privacy. It may not spy electronically without a judicial warrant, except perhaps if the subject of its surveillance is a foreign government, and it may not steal, or break and enter, or commit other ordinary crimes anymore than anyone else, which is obvious but necessary to assert these days. Yet the power to arrange security at the source, looked at in itself, is great. It would seem sufficient, and what is more, if it were nowhere countervailed it would be quite frightening—is anyway, perhaps—since the law in no wise guarantees its prudent exercise or even effectively guards against its abuse.

## Countervailing power

There is countervailing power, however, created by the First Amendment. The press, by which is meant anybody, not only the institutionalized print and electronic press, can be prevented from publishing—actually restrained, so that security is in fact not broken—only in extreme and quite dire circumstances. The rule of the *Pentagon Papers-New York Times* case calls for evidence of immediate harm of the gravest sort (typically loss of life or catastrophic injury to the national interest) flowing directly and ineluctably from publication, before a restraint will be allowed. So government may guard mightily against serious but more ordinary leaks, and yet must suffer them if they occur.

We have no Official Secrets Act, and can have none restraining publication of most secrets. The government cannot copyright anything, and almost certainly has no common-law literary property rights either. It does not own the contents of its documents. That great man, whom I held dear, Mr. Acheson, wrote at the time of the Pentagon Papers leak that the government owned those papers no less than it owns the White House silver or the battleship Missouri, and that THE PEOPLE, whether in upper or lower case, had no more right to the papers than to the silver or the battleship. One can understand Mr. Acheson's irritation with politicians and newspapermen masquerading as the one and only PEOPLE, but the talk about property is, in a favorite word of his own, nonsense.

To be sure, he who prints may, like anyone else, be punished for stealing, or for breaking and entering, or for eavesdropping, or under applicable laws for bribing a public official or otherwise buying information. But he may print without regard to literary property rights, which government does not possess, and he may be punished for stealing, etc. only if he himself did it or abetted it. Again, there is no constitutional reporter's

**Prof. Bickel of the Yale Law School prepared this paper for advance distribution to participants in the recent Freedom House-sponsored News Media/Government consultation.**

**Legwork, not leaks**

William Beecher

There is a basic misperception on how news is gathered. That misperception was the basis on which the "plumbers" were sent out on their task... Especially in the national security and foreign policy fields—which I know something about—most news is not gathered from an individual and most news is not volunteered by someone who has a viewpoint to project... In most cases you have reporters who are interested and specialize in certain areas, who are out developing sources, a variety of them; who gather bits and pieces much in the form of an artist putting a mosaic together.

—William Beecher

privilege, so that the identity of the thief or other security-transgressor may be learned from the press or other publisher, but there remains some not inconsiderable judicial control over inquiries into a reporter's sources, and in any event the power to print is not impaired. Lies, moreover, or at least non-truths, may be printed with fair impunity. There is little left of the law of libel, too little, in my judgment; we ought to think of recycling some of it.

It may be that under well-drafted statutes the criminal sanction would be more readily available than the prior restraint to punish breaches of government privacy, not only by those who do the immediate breaching, but by those who print. This is uncertain, and in any case it is extremely unlikely that the criminal sanction would be allowed to go all the way. For a while there is a difference between the prior restraint remedy and the criminal sanction in precision and immediacy, there is a severity to the criminal law which may in some circumstances enable it to deter and suppress more than it would in fact punish. It is unlikely to be held that the First Amendment allows the *in terrorem* effect of criminal prosecution to take away everything that protection against prior restraints is intended to give, and even in some circumstances more. What seems more likely is that the bright line between the one who directly breaches security, at least by leaking if not by stealing, and the one who publishes will be blurred when the courts find themselves confronting both in the same person, as was very nearly true in the Ellsberg case; and I mean blurred by stretching the protection of the publisher so as to cover the whole transaction. But this is something of a guess, not a reading of positive law now in existence.

**Institutional revolt**

– Cherne

In my judgment, we are dealing with very complicated questions. Let me state one hypothesis. I do not believe the Harris polls, for example, can be accepted as a measurement of specific institutional performance or as a measurement of relative institutional inadequacy. If, during the passage of time, confidence vested in some institutions went up while confidence in others went down, it would have been reasonable to conclude that some relative judgment was being expressed, measuring the improvement or decline of performance of each institution. But when we observe the unanimous decline in all institutions during the five-year period from 1966 to 1971, I believe we are seeing dramatic evidence of *institutional revolt*, of a growing distrust of complex and distant mechanisms.

—Leo Cherne

## An untidy accommodation

I need hardly point out that the position I have described is an untidy accommodation, highly unsatisfactory; like democracy, in Churchill's aphorism, the worst possible solution, except for all the other ones. It leaves too much power in government, and too much in the institutionalized press, too much power insufficiently diffused, indeed all too concentrated, both in government and in too few national press institutions, print and electronic. The accommodation works well only when there is forbearance and continence on both sides, albeit in context of an adversary relationship. It threatens to break down when the adversaries turn into enemies, as they have of late, when they break diplomatic relations with each other and gird for and actually wage war. Such conditions threaten graver breakdowns yet, as war-like clashes erode the popular trust and confidence in both government and press, on which effective exercise of the function of both depends.

The need for deliberative privacy of the judicial branch is, if anything, greater than that of the executive and legislative branches. For this reason, but partly also out of natural self-regard, one suspects that judges would be far readier to impose a prior restraint on publication if a draft of a Supreme Court opinion were leaked than when the Pentagon Papers were. In dealing with the free press-fair trial issue, however, the judges have adopted for themselves an untidy accommodation much like the one to which they have relegated government and the press in the security area. The judges guard security at the source. They issue orders to lawyers and other connected with a case to be silent on pain of punishment for contempt, but they neither enjoin nor punish publication of what they tried to keep confidential. At the trial stage, their power to exclude press and public is closely limited. In the end, if rarely, they may need to protect a defendant by frustrating prosecution, if all else has failed. But then they do so, bearing the cost of the First Amendment.

**Adversaries, not enemies**

When I was in the government and dealing with th press, I found relationships were established which we not all that adversary, because they usually implied an u derstanding on the part of the journalist that the gover ment official was basically a decent guy who was going t level with him as far as he could. There might be som point where for good reasons he couldn't; but the offici was not a liar. On the part of the government official the was a recognition the reporter had to be inquisitive, had t be skeptical; but he also wasn't a bad guy nor was he h enemy. This made the relationship a relaxed one for long, long time. Nobody really felt journalists were tryi to destroy the system.

**Benign classification**

There can be benign reasons for over classificatio It is not always because people want to protect themselv and their careers. I found that in the State Department you didn't classify something as "Secret" or stam "Emergency" on it, nobody high-up read it...Thi doesn't mean the rules and classification procedur should not be reexamined. For if you classify and ove classify, you are depriving people of information they a entitled to, and this is what causes so-called leaks.

—William Attwo

John Lynch | Thomas B. Ross

Allen Jackson | Lawrence M. Baskir